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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ROSTISLAV DIMITTRYI SHNAYDER,

Defendant and Appellant.

B227918

(Los Angeles County
Super. Ct. No. BA345664)

APPEAL from a judgment of the Superior Court of Los Angeles County.
William R. Pounders, Judge. Affirmed.

William L. Heyman, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Lance E. Winters, Steven E. Mercer and Sonya Roth, Deputy Attorneys
General, for Plaintiff and Respondent.

* * * * *

Appellant Rostislav Dimittryi Shnayder was charged with four counts of vehicular manslaughter with gross negligence (Pen. Code, § 192, subd. (c)(1)).¹ The jury found appellant guilty on all four counts of the lesser included offense of vehicular manslaughter with ordinary negligence (Pen. Code, § 192, subd. (c)(2)) a misdemeanor.²

The trial court sentenced appellant to a total of four years in county jail consisting of the maximum one-year for each of the four counts to run consecutively.

Appellant contends that the trial court abused its discretion in imposing the maximum term for each of the consecutive sentences.

Finding no abuse of discretion, we affirm.

FACTS

Prosecution Evidence

Carlos Campos testified that on August 27, 2008, at approximately 10:30 p.m., he was a back seat passenger in a black 2007 Nissan Maxima driven by his girlfriend Cristyn Cordova. They were traveling west on Colorado Boulevard in the City of Eagle Rock. The front passenger was Cristyn's brother Andrew Cordova, and Cristyn's sister Toni Marie Cordova and Jason Hernandez were also seated in the back with Campos. Cristyn Cordova was eight months pregnant.

While the Nissan was stopped at a traffic light, Campos noticed a white Mitsubishi Eclipse driven by appellant in the lane to his right also traveling west. Appellant made eye contact with Campos and revved his engine. Campos told Cristyn to ignore appellant. Appellant took off at a fast speed when the light changed. Cristyn drove at a normal speed and appellant slowed down until they were side by side, then sped up again.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² The jury verdict forms incorrectly state that appellant was found guilty of vehicular manslaughter with ordinary negligence "in violation of Penal Code Section 192(c)(2), a Felony."

Appellant continued to speed up and slow down three or four times as both cars drove west on Colorado Boulevard.

At one point Cristyn attempted to make a left turn but there were too many cars in the turn lane and she remained on Colorado Boulevard. At this time Cristyn was driving in excess of the posted speed limit which was 35 miles per hour. Cristyn sped up to get away from appellant but appellant managed to stay side by side with the Nissan and then edged ahead. The last thing Campos remembered clearly was seeing appellant slow down again. Both cars were travelling at a high rate of speed and Campos recalled hearing a loud bang followed by screams and cries before he blacked out.

At approximately 10:30 p.m. on August 27, 2008, Chris Nielsen was driving west in the number three lane of Colorado Boulevard. He saw three cars traveling west at a high rate of speed. He slowed down to watch them. He estimated the speed of the first vehicle to be approximately 70 miles per hour. The second vehicle was a white Mitsubishi Eclipse traveling at approximately 70 to 75 miles per hour, followed by a black Nissan sedan. The Nissan and the Mitsubishi were both in the number two lane and Nielsen watched as the Nissan changed lanes and moved into the number one lane, closest to the center median. Nielsen saw both cars traveling side by side for a few seconds. He then saw the Mitsubishi's brake lights come on and watched it "wobble and shudder." The Mitsubishi swerved left into the number one lane and came in contact with the Nissan. Nielsen saw the Nissan veer into the median and hit a tree. The collision was loud and Nielsen testified that it "sounded like an explosion."

Steve Cabral was sitting in the outside dining area at Tommy's Burgers on Colorado Boulevard at approximately 10:30 p.m. with his friends Philip Roxas, and Jason.³ He heard engines revving loudly and observed three cars driving west on Colorado Boulevard at a high rate of speed. The Nissan was in the number one lane, the Mitsubishi was in the number two lane, and a white Mercedes was in the number three

³ No last name was provided for Jason and he was not called as a witness.

lane. The vehicles were side by side and the Mitsubishi looked to be slightly ahead of the other two. He then heard a “big thump” which was so loud it made the ground shake.

Philip Roxas heard “loud motors accelerating” as he sat at Tommy’s Burgers. He saw three cars pass by and heard a loud explosion shortly afterwards.

James Kerman purchased hamburgers at approximately 10:30 p.m. the same night, and was parked on Colorado Boulevard west of Tommy’s Burgers. He testified that his van shook when three cars raced past him. He estimated the speed of the cars to be between 70 and 80 miles per hour. He heard the sound of tires screeching followed by a thud. When he looked up he saw a great amount of dust and debris in the air and a black rectangular shape in the area of the median which he recognized as a car.

Valerie Dawson was standing near the sidewalk outside Columbo’s Restaurant on Colorado Boulevard. She saw several cars driving west at excessive speeds. She saw a white Mitsubishi in the number two lane swerve into the number one lane and strike a black Nissan causing it to hit the curb and then strike the tree.

Antjuane Sims was driving east on Colorado Boulevard at approximately 10:30 p.m. He heard the sounds of screeches and a collision and realized that a car had hit a tree in the median. As he was trying to avoid the debris on the street he saw a white car coming towards him. There was nobody in the car and it clipped the rear of his vehicle before hitting a tree and finally coming to rest against a pole.

Leopoldo Ponseca owned a Honda vehicle that he left with his mechanic on August 24 or 25, 2008. On August 27, 2008, it was parked on Colorado Boulevard. He was informed that his vehicle had been involved in an accident. When he received his car back the driver’s side mirror was broken and there were dents and scratches above the left rear wheel and driver’s door. The car was not in that condition prior to August 27, 2008.

Detective Felix Padilla of the Los Angeles Police Department (LAPD) was the investigating officer. He arrived at the scene at approximately 2:30 a.m. He was briefed by the reporting officers on the scene and was informed that appellant had been detained. He observed a black Nissan Maxima wrapped around a tree in the center median. Based

on the damage to the Nissan, Detective Padilla determined that a high rate of speed was involved. The car had gone “from a high rate of speed to zero very quickly” and a lot of energy was dissipated. Vehicle parts were thrown over a hundred feet away from the tree. A white Mitsubishi Eclipse was inside a driveway on the opposite side of Colorado Boulevard in contact with a tall metal pole. The Mitsubishi was registered to appellant’s mother.

Cristyn Cordova and her sister Toni Marie Cordova were still pinned inside the Nissan. They were both pronounced dead at the scene. Dr. Stephen Scholtz conducted an autopsy on Cristyn Cordova on August 29, 2008. He found a rupture of the uterus with the fetus expelled into the abdominal cavity and associated hemorrhage. Jason Hernandez’ left leg was severed from the hip as he was ejected from the vehicle. He was also pronounced dead at the scene. Andrew Cordova the front passenger in the Nissan had already been transported to the hospital by paramedics. He died two days later from injuries sustained in the accident. Carlos Campos was also ejected from the car and was hospitalized for his injuries.

Kerry Berg, a collision analyst and accident reconstruction specialist was retained by the prosecution. He reviewed all police reports, accident reports, photographs, reports generated by the defense, and the transcript of the preliminary hearing. He and his team used electronic surveying equipment at the collision location to create scaled diagrams. Based on the evidence he had reviewed and his experience he determined that there were two vehicles traveling at a high rate of speed. The speed of the Mitsubishi was in the range of 71 to 73 miles per hour, and the Nissan was going a little faster.

Berg opined that the Nissan and the Mitsubishi were involved in a street race; the Mitsubishi originally in the number two lane encroached into the number one lane; the Mitsubishi came in contact with the Nissan; after the Nissan hit the curb numerous times it went over the curb through the center divider broadside and passenger side leading perpendicularly hit the tree; the tree intruded virtually to the opposite side of the car such that the front and rear of the Nissan literally wrapped itself around the tree; the Mitsubishi steered to the right; skid marks terminated at or near a speed of zero when

appellant exited the vehicle; the Mitsubishi continued to roll forward into the parked Honda which altered the Mitsubishi's direction back across the street; the driverless Mitsubishi then made contact with Antjuane Sims who was driving east on Colorado Boulevard before it sideswiped a tree and came to rest in a parking lot stopped by a pole.

Defense Evidence

Kevin Miller was standing on the sidewalk at Columbo's Restaurant on Colorado Boulevard between 10:00 p.m. and 10:30 p.m. on August 27, 2008. He saw a white Mitsubishi and a Nissan traveling at a high rate of speed. He saw a third car pass the Mitsubishi but could not describe it. The Mitsubishi lost control and fishtailed when the third unidentified car passed it. He did not see any contact between the Nissan and the Mitsubishi but testified that the Mitsubishi went into the number one lane causing the Nissan to hit the tree. When Miller spoke with the police on September 5, 2008, he told them they had arrested the right person because appellant "drove recklessly and had no control of his vehicle." At trial, he stated that when he told the police they had the "right guy" he meant that appellant was the driver of the Mitsubishi involved in the accident.

Appellant's mother, Irina Kirichenko, testified that she was the primary driver of the car and appellant drove it on the weekends. On August 27, 2008, she was at home and did not need the car. She gave him money to get a sandwich and he left at approximately 10:25 p.m. About five minutes later she received a call from appellant and she ran to where the collision had taken place. Kirichenko picked up the Mitsubishi from impound in October. When she took the car to be inspected by the defense expert she told him she had changed the tires on the car.

LAPD Officer Alfredo Villegas was assigned to investigate the collision. He arrived on the scene at approximately 11:00 p.m. He located and measured the skid marks that started in the number two lane and ended near the parked Honda. He rounded off all measurements in his report to the nearest foot as he was trained to do. He acknowledged that there could be at least a foot margin of error in his measurements. Officer Villegas did not call the Specialized Collision Investigation Detail (SCID) to investigate this case because it did not meet the criteria of city liability and was not

beyond the expertise of his officers. Based on the measurements he took and the investigation he conducted he believed the skid marks in the number two lane belonged to the Mitsubishi.

Mallie Donohoe was a traffic accident reconstructionist retained by the defense. He opined that (1) the Mitsubishi was not responsible for the skid marks attributed to it, and (2) the damage to the left side of the Honda was not consistent with having been struck by the Mitsubishi with the exception of the left side rear view mirror. Donohoe did agree that all of the evidence established that the Mitsubishi and the Nissan came into contact.

DISCUSSION

I. Appellant's Contention

Appellant contends the trial court abused its discretion in imposing three consecutive county jail sentences for the maximum term.

II. Standard of Review

On appeal, an “extremely deferential and restrained” abuse of discretion standard governs review of “the court’s broad latitude” of sentencing discretion. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 981.)

We review appellant’s contention for an abuse of discretion which we will find only if the trial court exercised its discretion “in an arbitrary, capricious or patently absurd manner resulting in a manifest miscarriage of justice. [Citation.]” (*People v. Shaw* (1998) 64 Cal.App.4th 492, 496.)

III. Legal Principles

A. Penal Code Section 19.2

Section 19.2 reads: “In no case shall any person sentenced to confinement in a county or city jail, . . . on conviction of a misdemeanor, . . . or for any reason except upon

conviction of more than one offense when consecutive sentences have been imposed, be committed for a period in excess of one year”

This section is not intended to limit imprisonment in county jail to a period of one year where several misdemeanors have been committed and sentences run consecutively; “[c]onviction of misdemeanor,” as used in this section means conviction of “a” misdemeanor. (*People v. De Casaus* (1957) 150 Cal.App.2d 274, 280.)

B. Penal Code Section 1170.1

Sentences which run consecutively to the principal term must be set at one-third of the middle term applicable to the particular offense in question. (Pen. Code, § 1170.1, subd. (a).) But the consecutive sentencing provisions of Penal Code section 1170.1 expressly apply only to felony offenses; when a defendant is convicted of misdemeanor offenses, there is no equivalent limitation. (Pen. Code, § 1170.1, subd. (a); see *In re Valenti* (1986) 178 Cal.App.3d 470, 475–476 [rejecting equal protection challenge to consecutive maximum sentences on multiple misdemeanor offenses].) In an adult sentencing on multiple misdemeanor counts, the court is free to impose consecutive sentences at the maximum term for each offense. (*In re Valenti, supra*, at pp. 475–476.)

IV. Proceedings Below

At sentencing the court indicated that it had read the People’s sentencing memorandum⁴ and had researched the law to determine the appropriate sentence. The court invited appellant to offer input on sentencing.

Defense counsel proceeded to distinguish the facts of this case from *People v. De Casaus, supra*, 150 Cal.App.2d 274. There the defendant who had been drinking was convicted of six counts of involuntary manslaughter, and received one year in jail for each offense. (*Id.* at pp. 275, 280.) Appellant on the other hand was not intoxicated, and did not leave the scene of the accident. He was a model citizen while out on bond for two

⁴ The record before this court does not contain the People’s sentencing memorandum.

years and his behavior during trial was outstanding. He was only 19 at the time of the collision and it was an emotional experience for him. He was respectful of the pain he caused the victims' family.

The prosecutor responded by pointing out that the victim impact in this case was extraordinary. In addition to the impact on the family of victim Jason Hernandez, the Cordova family "lost all of their children at one time" when Cristyn, Toni Marie, and Andrew Cordova were lost, and that a "potential grandchild of the Cordovas was also lost" because "Cristyn Cordova was eight-and-a-half months pregnant." The Cordova victims' father addressed the court and spoke of his loss.

The court credited appellant for staying at the scene of the collision and noted that "there are so many people that want to run when they've done something wrong." The court proceeded to give a statement of reasons for its sentence choice. Pointing out that the jury followed the law in finding ordinary negligence the court stated, "[h]itting his brakes is what I think the jury latched onto, as far as deciding that there was ordinary negligence." The court did not rely on any evidence that appellant enticed Cristyn Cordova to engage in street racing because the jury didn't find that to be true. Instead the court stated that rather than an intentional act by appellant, the likely cause of the collision was appellant's failure to control his vehicle which occurred when he hit the brakes while driving at an extremely high rate of speed, resulting in his vehicle fishtailing into the vehicle driven by Cristyn Cordova. Noting that Cristyn Cordova's unborn child also had a right to live, the court stated that this was a case that involved the maximum sentence.

V. Analysis

Appellant acknowledges that the trial court may impose consecutive sentences at the maximum term for each offense. (*In re Claude J.* (1990) 217 Cal.App.3d 760, 762–763.) But appellant argues that while the trial court could sentence appellant on each of the four convictions for "not more than one year" (§ 193, subd. (c)(2)), it had discretion to sentence appellant for less than one year on each conviction. Appellant concludes that

because the court had discretion to impose a lighter sentence and did not, it abused its discretion.

Appellant's logic is flawed as such an interpretation of the word "discretion" would restrict its meaning. He provides no authority for mandating a reduced sentence in every case in which discretion can be exercised. Here, the trial court exercised its discretion to impose the maximum sentence.

First, appellant reiterates a number of mitigating factors raised by defense counsel at sentencing to support his contention that the trial court abused its discretion. These include: appellant's youthfulness, his clean criminal record and behavior while on bail, and the fact that he remained at the scene of the collision. Appellant again distinguishes the facts of this case from *People v. De Casaus, supra*, 150 Cal.App.2d 274. There is no evidence to suggest that the trial court did not consider each of these factors prior to sentencing and the record shows that the trial court credited appellant for not fleeing the scene of the collision.

Next, appellant contends that the trial court did not give consideration to the role the victims played in the collision, and specifically the fact that Cristyn Cordova drove at a high rate of speed a couple of weeks before she was due to give birth. The court's many comments regarding street racing implies otherwise, and the trial court could well have concluded that her behavior was a substantial factor in causing the deaths. But, the jury's finding that appellant was guilty of four counts of vehicular manslaughter with ordinary negligence is a finding that appellant's act or acts also constituted a substantial factor in causing the deaths.

Appellant's contention that one-third of the maximum one-year sentence on each of the three consecutive sentences would have been more equitable is not supported by the law. Appellant contends that had the convictions in this case been felonies, the consecutive sentences would have been imposed at one-third of the middle term. But Penal Code section 1170.1 applies only to felony offenses and the court can impose a maximum term for consecutive sentences on misdemeanor counts. (*In re Valenti, supra*, 178 Cal.App.3d at pp. 475–476.)

Lastly, appellant contends the trial court made numerous comments during sentencing which displayed a bias and resulted in the trial court punishing appellant by imposing the maximum sentence possible. Specifically appellant contends that: (1) the trial court commented on the possibility that appellant had intentionally sideswiped the Nissan driven by Cristyn Cordova; (2) the trial court disagreed with the jury's failure to find appellant guilty of gross negligence; and (3) the trial court appeared to be influenced by the driver's fetus having been destroyed.

It is clear the trial court did not abandon its role as an impartial judicial officer, and to the extent that appellant asserts judicial bias, this claim is waived for failure to raise an appropriate objection in the trial court. (*People v. Hines* (1997) 15 Cal.4th 997, 1040–1041.) In any event, the record fails to support appellant's contention.

The evidence showed that significant skid marks were present at the scene of the collision but expert testimony disputed their origin and eyewitness testimony differed as to whether appellant applied his brakes or not. Chris Nielsen observed the Mitsubishi's brake lights come on but neither Valerie Dawson nor Kevin Miller did, yet all three saw the Mitsubishi swerve into the number one lane. Therefore, a reasonable inference that could be drawn is that appellant braked and subsequently lost control of his vehicle and collided with the Nissan. If appellant's Mitsubishi was not responsible for the skid marks yet did swerve and strike the Nissan, another reasonable inference that could be drawn is that appellant intentionally forced the Nissan off the road.

The court stated, "[I]t is self-evident that the one mistake that he did make while he was driving at an extremely high rate of speed, hitting his brakes, fishtailing into the adjacent car, if that's the way it occurred, and I'm giving the benefit of the doubt, because I'm hoping he didn't do it intentionally, sideswiping the car, forcing the car, in other words, to try to back down from the race, but the fishtailing into that car is what caused the death of five people, not four."

The jury found appellant guilty but returned a finding of ordinary negligence rather than gross negligence. The trial court did not claim the jury had erred and the statement that it was giving appellant the "benefit of the doubt" as to how the collision

occurred did not show bias but accepted the jury view of the evidence and ruled out other reasonable inferences.

While the trial court expressed its opinion that street racing at “75 miles an hour in a 35 mile an hour zone” should constitute a finding of gross negligence, it also recognized that this was not what the jury had found. The trial court stated that the “jury made the right decision” “under the law” and the sentence it pronounced reflected the correct degree of appellant’s negligence.

Finally, the fact that Cristyn Cordova was pregnant first came to the jury’s attention when Carlos Campos testified that they were expecting a child together. A forensic pathologist assigned to conduct an autopsy on Cristyn Cordova testified that he also performed an autopsy of the fetus and determined that it was viable. The court’s statement that “the fetus had a right to live, as well, and was destroyed in that accident” was a comment on a fact of the case.

We have examined the lengthy trial transcripts and nothing in the record suggests that the trial court’s sentence choice was influenced by or reflects personal animus toward appellant. The factors cited by the trial court here are supported by the record and justify the sentence choice. We do not find the court acted in an arbitrary or capricious manner, but exercised its discretion “consistent with the letter and spirit of the law” and properly considered “the offense, the offender, and the public interest.” (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.)⁵

⁵ In light of our conclusion that the trial court’s remarks did not constitute misconduct, much less prejudicial misconduct, we need not address appellant’s related argument that his trial counsel’s failure to object was ineffective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 [in order to show ineffective assistance of counsel, claimant must show that counsel’s deficient performance prejudiced defense].)

DISPOSITION

The judgment is affirmed.

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_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ